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No. 94-1988

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

CAMPS NEWFOUND/OWATONNA, INC.,
Petitioner,

v.

TOWN OF HARRISON, *et al.*,
Respondents.

On Writ of Certiorari to the Maine Supreme Judicial Court

PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

In their brief, respondents to a significant degree misconceive the issue, misapprehend petitioner's arguments, and misconstrue controlling decisions of this Court. In this reply, we discuss the parties' arguments under the following principal heads:

First, the issue: On its facts, this case presents the question whether the dormant Commerce Clause imposes *any* significant limits upon a state's exercise of its taxing power so as to discriminate against charities that serve non-residents. It does not present the question as to how far such limits might extend. Here, the charity is a Maine corporation; it conducts all of its charitable activities in Maine; and the taxed facility is dedicated solely to those activities. Thus, the case does not raise the question sometimes addressed by respondents respecting a state's right

to condition the grant of tax exemptions upon the performance of charitable activities within the state.

Second, impact on interstate commerce: Respondents maintain that the statute, while concededly discriminatory, does not burden interstate commerce for two reasons. To begin with, they maintain, correctly, that petitioner's campers are not "articles in commerce" and, incorrectly, that we said they are. Next, as to the argument we *did* advance—that the interstate travel integral to petitioner's service to non-residents constitutes interstate commerce—respondents attempt, unsuccessfully, to distinguish *Edwards* v. *California*, 314 U.S. 160 (1941), and *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241 (1964). Respondents also maintain, contrary to this Court's decisions, that evidence of adverse impact on travel is necessary.

Third, the appropriate test: Respondents maintain that, since the tax is a levy on real estate, any impact on interstate commerce is indirect, and that accordingly the "flexible" test, not the *per se* test, applies.

This reliance upon the form of the tax to escape the *per se* test is unavailing under established precedent. And so, too, is respondents' efforts to sidestep our contention that the statute is invalid under any test because constitutionally permissible alternatives were available. Respondents unaccountably dismiss petitioner's suggested alternatives on the notion that, instead of replacing the exemption, they would supplement it. So read, our argument would be foolish. Read properly, it is unanswered.

Finally, market participation and subsidies: Respondents contend, alternatively, that the statute is taken entirely outside the Commerce Clause by this Court's decisions respecting market participation and subsidies. Again, respondents' reading of those decisions is insupportable. Moreover, a decision unnoted by respondents, *New Energy Co.* v. *Limbach*, 486 U.S. 269 (1988), forecloses their argument.

We turn now to the detail of our reply.

II. RESPONDENTS MISCONCEIVE THE ISSUE.

In an effort to undermine both our claim that the Maine statute stands almost alone, and also our attack upon that statute, respondents cite three statutes from other jurisdictions claimed to be "similar, though not identical," to § 652(1)(A)(1).[1] Resp. Br. 3 n.4, 26-27. Surely the sparse results of the parties' combined research confirm, rather than vitiate, our contention respecting the general understanding of the reach of the Commerce Clause. Moreover, respondents' evident view that these other laws raise the same issue as § 652(1)(A)(1) reflects an unduly broad view of the question here presented.

Those provisions require that a charity, to one or another extent, dedicate funds or property to charitable activities within the jurisdiction in order to qualify for an exemption—a test that petitioner would pass. Whether a state can require that a charity perform charitable activity in-state to qualify for an exemption is a quite different question from that presented here: Whether a state may deny the exemption to a charity solely because it serves too many non-residents, even though it is a state citizen, provides charitable service only within the state, and dedicates the property in question entirely to that service. Requiring that charitable activities take place in-state may well raise substantial constitutional issues, but it is not necessary to address them here.

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[1] The statutes are D.C. Code § 47-1002(8), N.C. Gen. Stat. § 105-8(3), and 68 Okla. Stat. § 2887(8). The D.C. statute was enacted by Congress, Pub. L. No. 77-846 § 1(h), 56 Stat. 1089 (1942), and thus is irrelevant, since the dormant Commerce Clause does not restrict Congress.

III. RESPONDENTS' ARGUMENTS RESPECTING IMPACT ON INTERSTATE COMMERCE ARE MERITLESS.

Respondents concede that petitioner's non-resident campers "are consumers crossing State lines to purchase and 'consume' camping services delivered within Maine," and that "[t]here is no doubt that the exemption statute 'discriminates' in the sense that it creates categories of property owners and treats them differently." Resp. Br. 8, 12. Nor do respondents deny that the relevant distinction is the extent to which those owners serve nonresidents.

Nevertheless, respondents maintain that the discrimination does not burden interstate commerce for three reasons: First, the campers are not "articles in commerce." Resp. Br. 17-20. Second, "[n]either *Edwards* v. *California* nor *Heart of Atlanta Motel, Inc.* v. *United States* supports the position that the Commerce Clause protects campers crossing State lines against the alleged effects of the exemption statute." *Id.* at 20. And, third, "the statute is fundamentally about taxation of real estate . . . [and a]ny effect that it has on articles in interstate commerce . . . is secondary and incidental and does not invoke the rule of *per se* invalidity." *Id.* at 24. Under the "more flexible" test, respondents urge, the statute is valid. We now discuss these contentions.

A. While Campers Are Assuredly Not "Articles in Commerce," Their Interstate Travel Is Interstate Commerce.

We have not referred to campers as "articles in commerce," a wholly inapt and, as applied to persons, unfortunate phrase. We pass on, therefore, to the argument we did advance, namely that, as the Court put it in *Edwards*, "it is settled beyond question that the transportation of persons is 'commerce,' within the meaning of [the Commerce Clause]," 314 U.S. at 171-72, or, as the

principle was stated in *Heart of Atlanta*, that interstate commerce "include[s] the movement of persons through more States than one," 379 U.S. at 255-56.

Respondents' efforts to distinguish these decisions fail. As to *Edwards*, respondents believe the Court should have relied upon the Privileges and Immunities Clause rather than the Commerce Clause, as did the concurring Justices.[2] But the Court did not do so, and subsequent decisions have not cast any doubt upon the vitality of *Edwards'* explication of the dormant Commerce Clause. Indeed, *Edwards* was favorably cited in that context as recently as 1992 in *Fort Gratiot Sanitary Landfill, Inc.* v. *Michigan Dep't of Natural Resources*, 504 U.S. 353, 360 (1992).

Nor is there substance to respondents' suggestion that *Edwards* can be set aside because California's purpose, in contrast to Maine's, was complete exclusion of the targeted nonresidents. Resp. Br. 22. There is no basis in the *Edwards* opinion or in reason for supposing that the result would have been different if the statute had imposed a burdensome, but not prohibitory, tax. The central question there, as here, was whether interstate travel falls within the Commerce Clause, not the degree of encumbrance necessary to constitute a violation.

As to *Heart of Atlanta*, respondents rest upon two asserted distinctions. The first is that the facilities were "essential to the ability of citizens to exercise their right to interstate travel," whereas in the case at bar "the petitioner is not engaged in providing lodging or any other service necessary for interstate travel." Resp. Br. 22-23.

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[2] In his concurring opinion for himself and two other Justices, Justice Douglas simply "express[ed] no view" as to the Commerce Clause. 314 U.S. at 177. And Justice Jackson, in his separate concurrence, while regarding the Privileges and Immunities Clause as the better rationale, "agree[d] that the grounds of [the Court's] decision are permissible ones under applicable authorities." *Id.* at 181-82.

But it is not credible to suppose that the Commerce Clause extends to discrimination affecting interstate travel when that travel is viewed as a goal itself, but not when viewed as a necessary means to secure a service in another state.[3]

Respondents' second argument relates to the evidence in *Heart of Atlanta* respecting the degree to which discrimination affected interstate travel: "Marginal increases in tuition for petitioner's campers are very different from preventing travelers from using lodging accommodations." Resp. Br. 23. But the statute in question, the Civil Rights Act of 1964, prohibited all discrimination, and the reasoning of the Court did not depend on its extent. *See* 379 U.S. at 258.

B. Section 652(1)(A)(1)'s Adverse Impact on Interstate Commerce Is Sufficiently Predictable and Substantial.

As we pointed out in our initial brief (at 22), this Court has repeatedly declared that a finding that a tax discriminates is sufficient to condemn it without more. Nonetheless, the respondents continue to rely upon the Law Court's finding that " 'there is no evidence that the exemption statute impedes interstate travel.' " Resp. Br. 16, 23.

Respondents disregard the decisions we cited except for one. Respondents acknowledge that "petitioner cites *Fulton Corp.* v. *Faulkner*, 116 S. Ct. 848 (1996), for the proposition that no *de minimis* exception to a facially discriminatory tax is recognized by this Court," but attempt to distinguish *Fulton* on the ground that "[t]he record here shows no actual impact on camper choices. All impact must be inferred." Resp. Br. 16 n.15.

[3] Respondents err in claiming that, if interstate travel constitutes interstate commerce, tuition schedules favoring residents at state educational institutions would be outlawed. Resp. Br. 19 n.17. Preferences to state taxpayers in the use of *state-owned* facilities have nothing to do with *Edwards*, *Heart of Atlanta*, or this case and, as respondents correctly note, are doubtless constitutional. *See, e.g.*, *Martinez* v. *Bynum*, 461 U.S. 321, 327-28 (1983).

But that was precisely the situation in *Fulton*, as well as in *Maryland* v. *Louisiana*, 451 U.S. 725, 756-57 & n.28 (1981), and *Associated Industries of Mo.* v. *Lohman*, 114 S. Ct. 1815, 1822 (1994). In each case, the adverse impact was "inferred" from the existence of a tax discrimination rather than from evidence of record.

Moreover, by characterizing the impact solely in terms of the reaction of potential campers, respondents ignore the statute's effect on charities. As we have pointed out (Pet. Br. 16), the statute provides a powerful inducement for charities to limit the number of non-residents they serve to avoid loss of their tax exemptions.[4]

C. Even Apart from Interstate Travel, Other Interstate Aspects of Petitioner's Provision of Service Constitute Interstate Commerce.

As we noted in our opening brief (at 19), we have followed the lead of the Superior Court in focusing upon interstate travel because of the obvious relevance of

[4] Respondents add to their impact on commerce argument the following startling comment:

> "In any event, the Commerce Clause protects out-of-state competitors but does not protect out-of-state consumers. See *Commonwealth Edison Company* v. *Montana*, 453 U.S. 609, 618 (1981) (state severance tax on coal that falls mostly on out-of-state utility consumers is not discriminatory under Commerce Clause)." Resp. Br. 16.

There are many cases, like *Commonwealth Edison*, in which facially *non-discriminatory* laws are upheld even though their impact falls disproportionately upon out-of-state interests. But the Court has repeatedly held that discrimination against out-of-state consumers violates the dormant Commerce Clause. *See, e.g., Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("Economic protectionism . . . may include attempts to give local consumers an advantage over consumers in other States."); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 627 (1978) ("[A] State may not accord its own inhabitants a preferred right of access over consumers in other States to natural resources located within its borders.").

Edwards and *Heart of Atlanta*. But, as we also observed, this Court's decisions establish that "[n]either interstate transportation of goods nor of persons is necessary to a dormant Commerce Clause violation," and that "[t]he agreements between the petitioner and the nonresident campers are interstate transactions" that would implicate the Commerce Clause even apart from interstate travel. Pet. Br. 6, 16 n.17.

Respondents evidently disagree, believing that without interstate transportation of "articles in commerce" there can be no dormant Commerce Clause violation. Resp. Br. 17-20. Moreover, respondents understand us to maintain that *any* contract between residents of different states involves interstate commerce regardless of circumstances. Resp. Br. 15 n.14. Because respondents are incorrect on both counts, and in order to avert unwarranted expansion of the issue here presented, we now discuss the impact of § 652(1)(A)(1) on aspects of interstate commerce other than travel.

First, the decisions we have cited (Pet. Br. 16 n.17) establish that dormant Commerce Clause violations need not directly involve the transportation of goods or people. In *Boston Stock Exchange* v. *State Tax Comm'n*, 429 U.S. 318 (1977), the New York tax that was invalidated had imposed a tax on in-state securities transactions which discriminated against transactions involving sales on out-of-state exchanges. Its vice was that "the flow of securities sales"—not tangible articles in commerce—"is diverted from the most economically efficient channels and directed to New York." *Id.* at 336. Nor was there interdiction of "articles in commerce" in *Lewis* v. *BT Inv. Managers, Inc.*, 447 U.S. 27 (1980), where the state law foreclosed out-of-state competitors from the state investment advisory services market.[5]

[5] *See also Fulton Corp., supra* (state "intangibles tax" on stock discriminated against the stock of corporations that did no business in the taxing state).

In the case at bar, it is clear that more is involved than the different state residencies of the contracting parties. Petitioner's camp, with a population of several hundred campers who remain for a number of weeks (J.A. 46), is plainly not a "walk in" facility. Petitioner advertises in other states and "sends its Executive Director annually on camper recruiting trips across the country." J.A. 49-50, 52. In the typical instance, the arrangements leading to execution of the contracts with nonresidents surely involve interstate communications. Accordingly, assuming *arguendo* that the contracts by themselves do not constitute interstate commerce, the chain of events leading to them does, as decisions such as *United States* v. *South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944), establish.

In that case, the Court rejected the argument that contracts of insurance did not involve interstate commerce because they " 'are not commodities to be shipped or forwarded from one State to another.' " *Id.* at 546. The Court explained that it "examine[s] the entire transaction to determine whether there may be a chain of events which becomes interstate commerce," and that "[n]ot only . . . may transactions be commerce though non-commercial; they may be commerce . . . though they do not . . . concern the flow of anything more tangible than electrons and information." *Id.* at 546-47; 549-50.

Thus, there is here adverse impact on interstate commerce even without regard to interstate travel.

IV. THE FACT THAT § 652(1)(A)(1) IS A REAL ESTATE TAX IS IMMATERIAL.

Respondents maintain that, because the statute imposes a real estate tax, neither the *per se* test nor the Commerce Clause itself is applicable. Resp. Br. 24, 27. These contentions are not sustainable.

A. A Facially Discriminatory Real Estate Tax Is Subject to the *Per Se* Test.

We note preliminarily that respondents' contention respecting the appropriate test presents severe difficulties as

applied to § 652(1)(A)(1), which concerns taxes on both "real estate and personal property." Petitioner's payments included both types. J.A. 57. On respondents' analysis, then, part of the tax would be tested under the *per se* rule and part under the "flexible" rule.

This anomaly evidences the artificiality of the distinction proposed, an artificiality that is evident from respondents' discussion of the decision that applied the dormant Commerce Clause to a discriminatory personal property tax on logs imported from another state, *I.M. Darnell & Son* v. *Memphis*, 208 U.S. 113 (1908). That decision, respondents maintain, is irrelevant because of the "distinction between real property, which has a fixed location, and personal property, which is movable across state lines." Resp. Br. 9-10. On this theory, the decision in *Darnell* would have been reversed if the discriminatory levy had been a real property tax upon the facilities storing the imported logs rather than a tax upon the logs themselves. This result is insupportable both in reason and under this Court's decisions, which have made it clear that Commerce Clause determinations turn upon substance—the practical effect of statutes—not upon form.

The Court's dismissal of a contention similar to respondents' in *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609 (1981), is instructive. There, the Montana court had concluded that the severance tax in issue (which "[i]n many respects . . . is like a real property tax," *id.* at 624) was "not subject to the strictures of the Commerce Clause." *Id.* at 614. This Court disagreed:

> "The Court has . . . rejected any suggestion that a state tax or regulation affecting interstate commerce is immune from Commerce Clause scrutiny because it attaches only to a 'local' or intrastate activity. . . . In reviewing Commerce Clause challenges to state taxes, our goal has instead been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.'" *Id.* at 615-16 (citation omitted).

Decisions holding taxes invalid as facially discriminatory have also emphasized the immateriality of the form of the tax. Thus, *Westinghouse Elec. Corp.* v. *Tully*, 466 U.S. 388 (1984), in striking down a franchise tax measured by aggregate revenues, relied upon prior decisions though they had involved taxes on particular transactions. "It cannot be that a State can circumvent the prohibition of the Commerce Clause" because of a difference in the incidence of the tax. *Id.* at 404. Nor did it matter that the provision was an exemption, for "[w]e have declined to attach any constitutional significance to such formal distinctions that lack economic substance." *Id.* at 405. Most recently, the intangibles tax on stock that was invalidated as facially discriminatory in *Fulton Corp.* was not levied directly on any aspect of interstate commerce, but rather was measured by the amount of in-state business conducted by the corporate issuers of the stock. 116 S. Ct. at 855.

We know of no authority contrary to these decisions, nor do respondents assign any policy reason in support of according real estate taxes immunity from the *per se* rule applicable to all other forms of facially discriminatory taxes.

B. The "Direct Tax" Clause of the Constitution Is Irrelevant.

Whether or not real estate taxes are "direct taxes" within the meaning of Article I, Section 9, Clause 4 of the Constitution, and whether or not they could be apportioned, Congress surely has authority under the Commerce Clause to legislate against real estate taxes that impose undue burdens upon interstate commerce. Even absent such legislation, a state's "power to lay and collect taxes, comprehensive and necessary as that power is, cannot be exerted in a way which involves a discrimination against [interstate commerce]." *Pennsylvania* v. *West Virginia*, 262 U.S. 553, 596 (1923). Were it otherwise, states would be provided a shield that could be employed with-

out great ingenuity to achieve discriminatory results otherwise constitutionally barred.

V. SECTION 652(1)(A)(1) IS INVALID UNDER ANY TEST BECAUSE OF THE AVAILABILITY OF CONSTITUTIONALLY PERMISSIBLE ALTERNATIVES.

In our opening brief, we discussed the importance this Court has attached, in both facial and indirect discrimination cases, to the availability of constitutionally acceptable alternatives, and we identified several such alternatives that could have been utilized to achieve the purported goal of the Maine statute, including vouchers issued to residents for the purchase of services or direct payments to charitable institutions to defray residents' fees. Pet. Br. 28-32.[6]

Respondents avoid this argument by miscontruing it. They view our proposed alternatives, not as substitutes for the exemption, but as additions to it, so that "the State or its political subdivision would pay twice." And they observe, quite rightly, that "[i]t seems unlikely that any State would enact such a system." Resp. Br. 30.

But in the decisions we relied upon the Court used the term "alternative" in its ordinary sense as referring to a substitute, not to a supplement, and so did we, as our brief, we had thought, made unmistakably clear. Thus, we explicitly referred to the "replace[ment]" of the tax with alternatives, and to the result: "costs would be increased for those organizations now receiving an exemption." Pet. Br. 30-31.

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[6] We sometimes used the term "nondiscriminatory alternatives," a phrase often employed by the Court, which is appropriate if taken to mean alternatives that are not invidiously discriminatory. However, the measures we identified would distinguish between residents and nonresidents. Accordingly, other phrases also used by the Court, such as "reasonable and adequate alternatives," *Dean Milk Co.* v. *Madison*, 340 U.S. 349, 354 (1951), or alternatives "with a lesser impact on interstate activities," *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), are preferable.

Neither the Law Court nor respondents have indicated why the State's legitimate interest could not be adequately secured by such licit alternatives. Indeed, at a later point in their brief, respondents appear to agree that these alternatives would in fact achieve the State's objectives. Resp. Br. 39. Given the availability of alternatives, then, the statute would be infirm even were the "more flexible" test applicable.

VI. NEITHER THE MARKET PARTICIPATION NOR THE SUBSIDY EXCEPTION IS APPLICABLE.

Respondents argue that tax exemptions for charities constitute either "market participation" or a subsidy, and thus are exempted from scrutiny under the dormant Commerce Clause. But to characterize a tax exemption as a subsidy or as involving market participation would permit the exception to replace the rule. It is hard to imagine a discriminatory tax exemption that does not, in a sense, involve a "purchase" or a "subsidy." Thus, if respondents' reasoning were applied to *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263 (1984), there would be a "purchase" of distributors' patronage of local beverage producers, or a subsidy of those distributors. Similarly, *I.M. Darnell, supra* would involve a "purchase" of the patronage by lumber mills of local timber producers, or a subsidy of such mills. More generally, other cases would involve the "purchase" of the patronage by buyers of local services or products, or the subsidy of the suppliers of those services or products.[7] The purposes cannot be faulted, and are no less legitimate than those reflected by § 652(1)(A)(1). It is the means—discriminatory taxes—that have consistently been condemned.

Moreover, the First Amendment implication of respondents' contention discloses its infirmity. If Maine is purchasing recreational services or subsidizing camps through the exemption for their property, then it is also purchasing

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[7] *E.g., Westinghouse Elec., supra; Boston Stock Exch., supra; H.P. Hood & Sons* v. *Du Mond*, 336 U.S. 525 (1949).

religious services and subsidizing churches under the companion exemption for "houses of religious worship," Me. Rev. Stat. Ann. tit. 36, § 652(1)(G). The price of saving one exemption from the Commerce Clause would be condemnation of another under the First Amendment, since this Court's ratification of tax exemptions under that Amendment would be inapplicable.[8]

More particularly, the infirmities in respondents' arguments are these:

A. The Statute Reflects Governmental Action, Not Market Participation.

The Maine law does not involve "market participation" as that term has been employed in the three decisions upholding laws on the basis of this doctrine. Rather, as we will show, it is precisely the type of statute held *not* to involve market participation in *New Energy Co. of Indiana* v. *Limbach*, 486 U.S. 269 (1988).

Under the market participation doctrine, states are free from the limits of the Commerce Clause "when acting as proprietors," so that they may "share [with private market participants] existing freedoms from federal constraints." *Reeves, Inc.* v. *Stake*, 447 U.S. 429, 439 (1980). As to this issue, there is "a single inquiry: whether the challenged 'program constituted direct state participation in the market.'" *White* v. *Massachusetts Council of Constr. Employers, Inc.*, 460 U.S. 204, 208 (1983). In each of the market participation cases, the state (or political subdivision) bought or sold specific goods—cement from a state-owned plant in *Reeves*, a building in *White*, and automobile "hulks" in the seminal case, *Hughes* v. *Alexandria Scrap Corp.*, 426 U.S. 794 (1976).

In contrast, Maine is not, through the tax exemption, buying anything from anyone for anyone. There are no

[8] *See Walz* v. *Tax Comm'n*, 397 U.S. 664, 675 (1970) ("The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state.").

contracts of sale or purchase. Maine does not join, *e.g.*, campers or nursing home residents as a participant in the market for those services. Rather, Maine acts as a government.

New Energy Co. of Indiana confirms this conclusion. There, the Court struck down an Ohio statute granting a fuel sales tax credit for the use of ethanol produced either in Ohio or in any other state granting a reciprocal benefit to Ohio ethanol. The state was "purchasing," *i.e.*, encouraging, the production of ethanol by Ohio producers in the same way in which Maine is "purchasing" the provision of charitable services. But the Court ruled:

> "The market participant doctrine has no application here. The Ohio action ultimately at issue is neither its purchase nor its sale of ethanol, but its assessment and computation of taxes—a primeval governmental activity." 486 U.S. at 277.

This decision forecloses respondents' contention.

B. Tax Exemptions Are Not Equivalent to Subsidies.

Respondents argue that § 652(1)(A)(1) "may also be analogized to subsidization." Resp. Br. 38. But, as we have pointed out, this Court has repeatedly treated discriminatory tax exemptions and credits as equivalent to discriminatory taxes, not as constitutional subsidies. Pet. Br. 23-24.[9]

Again, *New Energy Co. of Indiana* is dispositive. The plaintiff was an Indiana ethanol producer that was itself the beneficiary of a direct subsidy from Indiana. Neither this apparent irony nor the functional similarity between the Ohio exemption and the Indiana subsidy saved the Ohio statute.

[9] *See also West Lynn Creamery, Inc.* v. *Healy*, 114 S. Ct. 2205, 2220 (1994) (Scalia, J., concurring) (distinguishing between a "discriminatory 'exemption' from [a] nondiscriminatory tax" and "application of a state subsidy from general revenues").

> ". . . To be sure, the [Ohio] tax credit scheme has the purpose and effect of subsidizing a particular industry, as do many dispositions of the tax laws. That does not transform it into a form of state participation in the free market. . . ."
>
> * * * *
>
> "It has not escaped our notice that the appellant here . . . is the potential beneficiary of a [subsidy] scheme no less discriminatory than the one that it attacks . . . . [However,] [d]irect subsidization of domestic industry does not ordinarily run afoul of that [Commerce Clause] prohibition; discriminatory taxation of out-of-state manufacturers does." 486 U.S. at 277-78.

Thus, § 652(1)(A)(1) cannot be saved as the equivalent of a subsidy any more than as the equivalent of market participation, and for the same reason: it is the equivalent of a facially discriminatory tax.

CONCLUSION

The judgment of the Maine Supreme Judicial Court should be reversed and the case remanded to that court for appropriate relief.

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